

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOHN SCHLABACH,  
Plaintiff,  
  
v.  
  
INTERNAL REVENUE SERVICE,  
Defendant

No. CV-09-298-FVS

ORDER DENYING  
RECONSIDERATION

INTERNAL REVENUE SERVICE,  
Defendant.

**THIS MATTER** comes before the Court based upon Plaintiff John Schlabach's motion for reconsideration. He is representing himself. The Internal Revenue Service is represented by Christopher J. Williamson.

## BACKGROUND

The Internal Revenue Service ("IRS") has commenced more than one investigation of John Schlabach. During 2009, he learned the IRS has placed four letters in his file. The letters allegedly relate to tax shelters. He denies he wrote the letters or authorized anyone to send them on his behalf. Consequently, he demanded the IRS remove the letters from his file. When the IRS refused, he commenced an action pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a *et seq.* The IRS moved to dismiss his complaint on the ground Congress has stripped district courts of jurisdiction over Privacy Act claims such as his:

The provisions of subsections (d)(2), (3), and (4), and (g) of section 552a of title 5, United States Code, shall not be

1 applied, directly or indirectly, **to the determination of the**  
2 **existence or possible existence of liability (or the amount**  
3 **thereof) of any person for any tax**, penalty, interest, fine,  
4 forfeiture, or other imposition or offense to which the  
provisions of this title apply.

5 26 U.S.C. § 7852(e) (emphasis added). The Court agreed with the IRS  
6 and dismissed his complaint for lack of subject-matter jurisdiction.  
7 Fed.R.Civ.P. 12(b)(1). He filed a motion urging the Court to vacate  
8 its order, Fed.R.Civ.P. 60(b), or, in the alternative, reconsider the  
9 decision, Fed.R.Civ.P. 59(e). The Court invited the parties to  
10 supplement the record. They have done so. Among other things, the  
11 IRS has submitted a declaration from Kathryn S. Lopez, who is an IRS  
12 Revenue Agent. She alleges that, some years ago, she began  
13 investigating whether John Schlabach is liable for unpaid federal  
14 income tax and penalties. She alleges that, during the course of her  
15 investigation, she acquired the letters to which Mr. Schlabach takes  
16 exception. Finally, she alleges she has not completed her  
17 investigation. Mr. Schlabach challenges the accuracy of Agent Lopez's  
18 final allegation. As authority, he cites a declaration that Derik  
19 Hudson, another Revenue Agent, filed in the United States District  
20 Court for the Middle District of Louisiana. Agent Hudson declared the  
21 IRS has decided to close two investigations concerning Mr. Schlabach.  
22 Mr. Schlabach argues that since the IRS has closed its investigations,  
23 and since he has no connection to the disputed letters, the Court has  
24 jurisdiction over his complaint and should order the IRS to remove the  
25 disputed letters from his file. The IRS submits his argument is  
26 foreclosed by 26 U.S.C. § 7852(e). According to the IRS, there is no

1 language in the statute requiring the agency to purge its files once  
2 it completes an investigation.

3 **RULING**

4 The Court has entered a valid judgment. Mr. Schlabach concedes  
5 the Court lacks a basis for vacating the judgment under Rule 60(b)(6).  
6 However, he urges the Court to alter or amend the judgment pursuant to  
7 Rule 59(e). As the IRS points out, Mr. Schlabach may not use Rule  
8 59(e) as a vehicle for rearguing issues the Court resolved against him  
9 prior to entering judgment. Rather, in order to qualify for relief  
10 under Rule 59(e) (*i.e.*, in order to obtain reconsideration of the  
11 order), Mr. Schlabach must demonstrate the Court clearly erred; not  
12 just erred, but clearly erred. *School Dist. No. 1J, Multnomah County*  
13 v. *ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (a district court  
14 may alter or amend a judgment if it "committed clear error").

15 The Court dismissed Mr. Schlabach's complaint because, in the  
16 Court's opinion, a district court lacks authority to determine which  
17 materials the IRS may retain during the course of an investigation  
18 regarding a taxpayer's potential liability. Perhaps so, says Mr.  
19 Schlabach; but even assuming the Court is correct, he insists the IRS  
20 has completed its investigations of him. He argues that, as a result,  
21 the Court owes no deference to the IRS. The IRS disagrees. It  
22 submits that once one of its agents retains a document as part of an  
23 investigation regarding a taxpayer's potential liability for unpaid  
24 taxes, district courts are forever barred by 26 U.S.C. § 7852(e) from  
25 reviewing the agency's decision to retain the document. To date, the  
26 Ninth Circuit has not squarely addressed the issue. Nevertheless,

there is some support for the IRS's position. For one thing, § 7852(e) contains no language limiting the operation of the statute to ongoing investigations. For another thing, the few decisions that exist tend to support the IRS's position. See, e.g., *Ford v. United States*, 981 F.2d 1292 (9th Cir.1992) (**unpublished opinion**).

Admittedly, the authorities cited by the IRS are not overwhelming. However, Mr. Schlabach has not demonstrated the IRS's interpretation of § 7852(e) is clearly erroneous. Thus, if the Court erred in dismissing his complaint (a point the Court does not concede), the Court did not commit a clear error of law; and absent a clear error, reconsideration is unwarranted. The Court will deny Mr. Schlabach's request for relief pursuant to Rule 59(e).

**IT IS HEREBY ORDERED:**

Plaintiff John Schlabach's motion to vacate, or, in the alternative, to reconsider (**Ct. Rec. 25**) is **denied**.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to Mr. Schlabach and to counsel for the defendant.

**DATED** this 23rd day of September, 2010.

s/ Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge